United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 21,801

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

396

JAMES T. BENN,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

JAMES T. BENN
1201 South Court House Road
Arlington, Virginia

Taxpayer, Pro, Se

June 24, 1968

No. 21,801

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I N D E X

CITATIONS

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BRIEF FOR APPELLANT

STATEMENT OF QUESTIONS PRESENTED

I. Whether the District Court erred in granting the Government's Motion for Summary Judgment, where it was clear from the Motion papers and the exhibits that there was a dispute as to a material fact.

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was conferred by Sections 7401 and 7402 Internal Revenue Code of 1954, and by Sections 1340 and 1345 of Title 28 United States Code which references are set forth in Paragraph 2 of the Government's Complaint filed October 1, 1964.

Jurisdiction in this Court is based on Section 1291, Title 28, United States Code. The Judgment from which Appeal is taken was entered January 23, 1968 and a timely Motion for Reconsideration was denied on February 9, 1968. The Notice of Appeal was timely filed February 23, 1968.

STATEMENT OF CASE

The facts in this Appeal are straight forward although this case has had a long and complex history in its progress from the Tax Court, to the Fifth Circuit Court of Appeals,

to the Supreme Court and to the Court below. Only one fact remains to be resolved -

> Whether the amount of Tax claimed in the Government's complaint is correct.

On April 3,1964 the Tax Court entered a decision setting forth the following tax deficiencies (Exhibits attached to Government's Motion For Summary Judgment):

			Additions to Tax - I.R.C. 1939		
Year	Deficiency	§291(a)	§293(b)	§294(d)(1)(A)	§294(d)(2)
1951	--	--	$1,276.75	--	--
1953	$17,451.66	$4,362.92	8,725.83	$1,737.08	None
1954	8,060.69	--	4,030.35	795.27	None
1955	68,209.06	--	--	--	--

	Additions to Tax - I.R.C. 1954	
Year	§6653(b)	§6654(a)
1955	$34,104.53	$ 151.34

/S/ John W. Kern
Judge

Prior to the entry of this unagreed decision, a stipulated decision was prepared by the Internal Revenue Service and submitted to the taxpayer for signature (Exhibit attached to Opposition To Motion for Summary Judgment).

The deficiencies set forth in the stipulation are as follows:

		DEFICIENCIES				
		Additions to the tax				
		I.R.C 1939			I.R.C. 1954	
Year	Income Tax	§291(a)	§293(b)	§294 (d) (1) (A)	§6653(b)	§6654(a)
1951	—	—	$1,276.75	—	—	—
1953	$17,451.66	$4,362.92	8,725.83	$1,737.08		
1954	8,060.69	—	4,030.35	795.27	—	—
1955	52,808.64	—		—	$26,404.32	$ 151.34

The deficiencies for the year 1955 under the decision as entered is $68,209.06 but on proposed stipulated decision as prepared by the Internal Revenue Service the deficiency is only $52,808.64 This discrepancy is nowhere explained in the record.

Attached to taxpayer's Reply to the Government's Opposition to Taxpayer's Motion For Reconsideration is a letter dated October 7, 1958 from the Chief Accountant of Nederlandsche Handel-Maatschappi, 62 Williams St. N.Y. /Signed/ Chief Accountant, addressed to Internal Revenue Service stating tha t $20,000.00 in an account in taxpayer's name in the said bank had been transferred to an account and paid to the Internal Revenue Service. The judgment of the Court below failed entirely to consider this $20,000.00 credit. Moreover, and this is a matter outside the present record but which would have been developed at a trial on the merits, $60,000.00 of taxpayer's money has been siezed and paid on October 4, 1958 from Deposit Box Number 4658

in the Bowery Savings Bank, 110 East 42nd Street, New York, N.Y.

This credit likewise is nowhere considered in the judgment of the Court below and no opinion was rendered.

STATEMENT OF POINTS AND SUMMARY OF ARGUMENT

The discrepancies between the tax liabilities as computed by the Government on various occasions coupled with the evidence of credits in favor of the taxpayer not treated in any of the Government's figures or the judgment establish a dispute as to a material fact rendering summary judgment improper.

ARGUMENT

It is a xiomatic that Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure should not be granted if there is a dispute as to any material fact. See, for example Fountain v. Wilson 69 Sup. Ct. 754, 336 U.S. 681 (1949); Washington Post, Co. V. Keogh, 365 Fed 965 (CA.DC; 1966). No fact could be more material than the amount of tax claimed by the Government, yet on at least two (2) occasions the Government on papers prepared by them have claimed amounts varying by over $25,000.00.

Before the Court below were two vital and contradictory documents- (a) a stipulated decision never signed by the taxpayer or entered on which the tax liability for year 1955 is shown as $52,808.64, and (b) the decision actually entered the Tax Court showing the liability entered for the same year (1955) as $68,209.06. This variance is nowhere explained and raises a strong showing tha t Government should have been put to its proof of the exact manner in which the tax deficiencies were computed.

Moreover, the Court below was given ample evidence of at least $20,000.00 credit in favor of the taxpayer which is nowhere reflected in the Government's papers or the Judgment.

It may be suggested that such credits are an administrative matter to be resolved after Judgment, but justice will certainly not be seen to be done, if the taxpayer is once again left to the tender mercies of the Internal Revenue Service to determine what credits he is entitled to.

Surely, at this vital juncture taxpayer may be entitled to learn from a court of competent jurisdiction what is the correct amount of the judgment as reflected in the figures set forth in the Memorandum Findings of Fact and Opinion of the Tax Court, dated May 31, 1963 which is the sole basis for the decision of April 3, 1964.

In view of the factual disputes revealed by the record it was error for the Court below to grant the Government's Motion for Summary Judgment, and thereby depriving the taxpayer of a hearing on the merits.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that this case should be reversed and remanded for trial.

Respectfully submitted,

James T. Benn

James T. Benn, Taxpayer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed to the Assistant Attorney General, Tax Division, Department of Justice, Washington, D. C. this 24th day of June 1968.

James T. Benn

James T. Benn

No. 21,801

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES T. BENN, DEFENDANT-APPELLANT

On Appeal from the Judgment of the United States District Court for the District of Columbia

---

BRIEF FOR THE APPELLEE

MITCHELL ROGOVIN,
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LEE A. JACKSON,
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TABLE OF CONTENTS

CITATIONS

Cases:

Miscellaneous:

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JAMES T. BENN, DEFENDANT-APPELLANT

On Appeal from the Judgment of the United States District Court for the District of Columbia

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly granted the Government's motion for summary judgment where the only question before the court was a legal one.

STATEMENT OF THE CASE

This is an appeal from the judgment entered January 23, 1968, for the Government by the United States District Court for the District of Columbia (Docket Entries 2) in the amount of $246,884.68 with interest

and costs in an action instituted by the Government to reduce to judgment federal income tax liabilities assessed against the taxpayer, James T. Benn, for the years 1951, 1953, 1954, and 1955. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

On October 2, 1958, the District Director of Internal Revenue, Jacksonville, Florida, made a jeopardy assessment against the taxpayer for federal income tax deficiencies, interest, and additions to taxes, including civil fraud penalties, for the taxable years 1951, 1953, 1954, and 1955, on the same date gave the taxpayer notice and demand for payment of the assessments, in the amounts set forth below (O'Donnell Affidavit pars. 2, 3):

Period of Tax	Assessed Liability	
12-31-51	$ 17,064.98	T.
	8,352.49	P.
	6,703.03	I.
12-31-53	17,451.66	T.
	8,725.83	P.
	4,362.92	P.
	2,779.32	P.
	4,760.72	I.
12-31-54	25,156.50	T.
	12,578.25	P.
	4,007.75	P.
	5,227.38	I.
12-31-55	189,879.66	T.
	94,939.83	P.
	151.34	P.
	38,063.17	I.

A statutory notice of deficiency was issued on November 5, 1958, and taxpayer filed his petition with

the Tax Court for a redetermination of these deficiencies. The Tax Court, in its decision entered on April 3, 1964, determined deficiencies in income taxes and addition to taxes due from taxpayer in the following amounts (Order and Decision of Tax Court 2):[1]

		Additions to Tax—I.R.C. 1939			
Year	Deficiency	§ 291(a)	§ 293(b)	§ 294(d)(1)(A)	§294(d)(2)
1951	—	—	$1,276.75	—	—
1953	$17,451.66	$4,362.92	8,725.83	$1,737.08	None
1954	8,060.69	—	4,030.35	795.27	—
1955	68,209.06	—	—	—	—

	Additions to Tax—I.R.C. 1954	
Year	§ 6653(b)	§ 6564(a)
1955	$34,104.53	$151.34

The Tax Court's decision was affirmed *per curiam* by the United States Court of Appeals for the Fifth Circuit on October 6, 1966 (*Benn* v. *Commissioner*, 366 F. 2d 778), and on November 15, 1966, the taxpayer's petition for rehearing was denied (*Benn* v. *Commissioner*, 368 F. 2d 230 (C.A. 5th)). The Supreme Court denied taxpayer's petition for certiorari on October 9, 1967. *Benn* v. *United States*, 389 U.S. 833.

The instant litigation was instituted by the appellee, the United States Government, on October 1, 1964, in the United States District Court for the Dis-

[1] The Tax Court's memorandum findings of fact and opinion of May 31, 1963, are reported at 22 T.C.M. 707 and the certified order and decision of the Tax Court is attached to the Government's motion for summary judgment.

trict of Columbia, for the purpose of reducing to judgment the taxpayer's federal income tax liabilities. (Compl. par. 1.) Taxpayer's answer to the Government's complaint was filed on November 7, 1964. (Docket Entries 2.) In his answer, taxpayer either admitted or denied the allegations contained in the complaint. (Ans. 1.) The action was stayed until February 28, 1967 (Docket Entries 2), because of the pendency of taxpayer's appeal from the decision of the Tax Court. On December 15, 1967, the Government moved for summary judgment (Docket Entries 2.) An affidavit by the District Director of Internal Revenue, Jacksonville, Florida (sworn to November 14, 1967), and a certified copy of the decision entered by the Tax Court on April 3, 1964, in *Benn* v. *Commissioner*, *supra* (certified on August 2, 1967), were filed in support of the Government's motion for summary judgment. (Docket Entries 2.) Taxpayer filed no affidavits, and on January 2, 1968, the Government's motion for summary judgment was granted. On January 3, 1968, taxpayer filed, out of time, his opposition to the Government's motion for summary judgment accompanied by what taxpayer alleges (Opposition 3) to be an unsigned "proposed stipulated Decision" of the Tax Court (Docket Entries 2). Judgment for the Government in the amount of $246,884.68 [2] plus interest and costs was

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[2] This is the amount certified by the District Director as owing and due as of November 14, 1967 (O'Donnell Affidavit par. 5):

[Footnote continued on page 5]

entered on January 23, 1968. (Docket Entries 2.) Thereafter, on February 1, 1968, taxpayer filed a motion for reconsideration and to set aside this judgment. (Docket Entries 2.) This motion was denied on February 9, 1968. (Docket Entries 2.) Taxpayer now appeals to this Court.

ARGUMENT

The District Court Properly Granted the Government's Motion for Summary Judgment When the Only Question Before the Court Was a Legal One

The question resolved by the court below was whether the tax which the Government asserted was

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[2] [Continued]

Assessment Under Tax Court Decision 4-3-64		Unpaid Assessed Liability	Interest Accrued To 11-14-67	Unpaid Balance	Daily Accrual
1951 IT	$ 1,276.75 P.	$ 1,276.75	$ 698.35	$ 1,975.10	$ .21
1953 IT	17,451.66 T. 4,362.92 P. 8,725.83 P. 1,737.08 P.	32,277.49	22,418.47	54,695.96	5.30
1954	8,060.69 T. 4,030.35 P. 795.27 P.	12,886.31	8,724.74	21,611.05	2.11
1955	68,209.06 T. 34,104.53 P. 151.34 P.	102,464.93	66,137.64	168,692.57	16.84
		$148,905.48	$97,979.20	$246,884.68	$24.46
	Lien filing fee (2)			8.00	
	Total amount due 11-14-67			$246,892.68	

owing and due was in fact owing and due by the taxpayer. The answer to this question is beyond dispute. The liability for the amount of tax sought to be collected by the Government had been settled by the decision of the Tax Court which had become final. Taxpayer's appeal in this case from the granting of the Government's motion for summary judgment is completely without merit, as this case was one ripe for summary judgment, and no error was committed by the court below in granting the Government's motion.

The tax sought to be reduced to judgment was the unpaid balance of deficiencies determined by the Tax Court to be owing and due from the taxpayer in its decision entered on April 3, 1964, and affirmed *per curiam* October 6, 1966 (*Benn* v. *Commissioner*, 366 F. 2d 778 (C.A. 5th), rehearing denied, 368 F. 2d 230, certiorari denied, 389 U.S. 833). The Government's motion for summary judgment was supported by an affidavit from the District Director of the district in which taxpayer filed his returns attesting to the amount of tax and interest outstanding and due from the taxpayer through November 14, 1967, for the taxable years involved herein (O'Donnell Affidavit par. 5), a certificate of the Clerk, Tax Court of the United States, certifying that the attached decision of the Tax Court represented a true copy of the decision entered by the Tax Court on April 3, 1964, and a statement of the facts and memorandum of law in support of the Government's motion.

Taxpayer's liability for the tax deficiencies having been litigated on the merits, taxpayer can not now dispute his liability. The decision of the Tax Court

is a final judgment on the merits of the case for the taxable years involved herein, binding upon the taxpayer, and is res judicata in this action. *United States* v. *International Building Co.*, 345 U.S. 502; *Commissioner* v. *Sunnen*, 333 U.S. 591; *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622 (C.A. 4th); *Clark* v. *United States*, 281 F. 2d 443 (C.A. 9th); *Erichson* v. *United States*, 309 F. 2d 760 (Ct. Cl.).

Rule 56(e) of the Federal Rules of Civil Procedure (Appendix, *infra*) authorizes the issuance of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In considering the Government's motion the District Court had before it from the Government its complaint, its motion for summary judgment supported by a certified copy of the Tax Court decision and an affidavit prepared by the District Director of Internal Revenue, Jacksonville, Florida, which set forth the unpaid balance of taxpayer's liabilities. The District Court had from the taxpayer his answer to the complaint which merely denied liability.[3] On the basis of these documents, the District Court had no alternative but to grant the Government's motion, as the Government

[3] As noted before, summary judgment was granted before taxpayer's opposition, which was untimely, was filed with the District Court. However, taxpayer's opposition, with its attachment, was insufficient to dispute the factual allegations contained in the Government's affidavit.

had clearly demonstrated that there was no genuine issue of fact existing. *Washington Post Co.* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F. 2d 965, certiorari denied, 385 U.S. 1011; *Underwater Storage, Inc.* v. *United States Rubber Co.*, 125 U.S. App. D.C. 297, 371 F. 2d 950, certiorari denied, 386 U.S. 911; *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (C.A. 2d). Where a moving party supports his motion for summary judgment by affidavits, or other appropriate means, which are uncontroverted, a trial court is fully justified within the meaning of Rule 56 of the Federal Rules of Civil Procedure in granting relief to the moving party. It is well settled that an adverse party may not rest upon the mere allegations or denials in his pleadings, but his response by affidavits or otherwise must set forth specific facts showing that there is a genuine issue of fact for trial. *Dressler* v. *MV Sandpiper*, 331 F. 2d 130 (C.A. 2d); *Engl* v. *Aetna Life Ins. Co.*, *supra*; *Hoffman* v. *Herdman's Ltd.*, 41 F.R.D. 275 (U.S. D.C. So. Dist. N.Y.); *Town House, Inc.* v. *Paulino*, 381 F. 2d 811 (C.A. 9th); *Bumgarner* v. *Joe Brown Co.*, 376 F. 2d 749 (C.A. 10th); *Scarboro* v. *Universal C.I.T. Credit Corp.*, 364 F. 2d 10; Rule 56(c), Federal Rules of Civil Procedure. The allegations and denials in taxpayer's answer did not raise a triable issue of fact, and they were insufficient to prevent the entry of summary judgment. *Hoffman* v. *Herdman's Ltd.*, *supra*; *Williams* v. *Baltimore & Ohio R.R. Co.*, 303 F. 2d 323 (C.A. 6th); *Bumgarner* v. *Joe Brown Co.*, *supra*.

After summary judgment was granted, taxpayer's opposition to it was received by the District Court.

In his opposition to summary judgment, taxpayer did not deny liabilities for taxes for 1951, 1953, 1954, and 1955, but opposed the motion on the grounds that variances existed in the amount of tax liability set forth in the complaint, in the papers supporting the motion for summary judgment, and in a purported unsigned stipulated decision of the Tax Court which he attached to his opposition to the motion. (Taxpayer's Opposition 1.) These variances in figures can easily be explained, and taxpayer is, no doubt, aware of the explanations. The amount of tax alleged to be due in the Government's complaint was $423,010.93, which was the unpaid balance of the jeopardy assessment made against taxpayer on October 2, 1958. (Compl. par. 4.) This fiigure was used because the Tax Court decision, at the time the complaint in this case was filed, was in the process of being appealed by the taxpayer. The actual amount which the Government sought in its summary judgment was the amount determined by the Tax Court, whose decision had become final at the time the motion for summary judgment was filed, and this was the amount which appeared in the affidavit of the District Director and in the decision of the Tax Court certified by its Clerk, i.e., $148,905.48 of federal income taxes and penalties, plus accured interest of $97,979.20 computed to November 14, 1967. (O'Donnell Affidavit par. 5.) Taxpayer argues (Br. 3) that in the decision entered by the Tax Court the amount of the deficiency for 1955 is $68,209.06, but that in the proposed stipulated decision the amount is $52,808.64, and that no expla-

nation is given in the record for this discrepancy. Taxpayer was well aware of the decision entered by the Tax Court as the record shows that he filed a motion with the Tax Court in opposition to the Commissioner's computation and a hearing was had on the matter at which taxpayer appeared (Tax Court Order and Decision 1), and subsequently he filled a motion to vacate the Tax Court's decision and for rehearing, which was denied. The purported decision attached to taxpayer's opposition to the Government's motion for summary judgment is inadmissible on the question of the amount of tax liability as it shows clearly on its face that it is unsigned and was not entered by the Tax Court.[4] *Washington Post Co.* v. *Keogh, supra.*

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[4] Taxpayer alleges (Br. 3) that $20,000 in an account in his name at Nederlandsche Handel-Maatschappi had been paid to the Internal Revenue Service and that the court below, in its judgment, has not given him credit for this amount. The letter of October 7, 1958, from the New York agency Nederlandsche Handel-Maatschappi, to the District Director indicates that the $20,000 remains in an account designated: James T. Benn, *blocked account.* There is no indication that the Internal Revenue Service has received the $20,000, and taxpayer has produced no evidence to substantiate this. In addition taxpayer alleges (Br. 3-4) that $60,000 has been seized and paid to the Internal Revenue Service from taxpayer's safe deposit box at the Bowery Savings Bank. As taxpayer indicates in his brief (p. 3), there was no evidence of record to substantiate this allegation at the time summary judgment was granted, nor was it even before the court. Any payments actually made by the taxpayer, or on his behalf, will certainly be credited to his account by the Internal Revenue Service. It should be noted that taxpayer has in litigation other years (1956-1958) of tax liability and it is possible that such alleged payments may have been, if actually made, credited to these years.

CONCLUSION

For the foregoing reasons the decision of the District Court is correct, and should be affirmed.

Respectfully submitted,

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LEE A. JACKSON,
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Washington, D. C. 20530.

Of Counsel:

DAVID G. BRESS,
United States Attorney.

July, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this day of July, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

Mr. James T. Benn
1201 South Courthouse Road
Arlington, Virginia 22204

DAVID G. BRESS
United States Attorney

APPENDIX

Federal Rules of Civil Procedure:

Rule 56.

SUMMARY JUDGMENT

(*a*) [as amended December 27, 1946] *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declatory judgment may, at any time after the expiration 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27. 1946, eff. March 19, 1948.

* * * *

(*c*) [as amended December 27, 1946, and January 21, 1963] *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

* * * *

(*e*) [as amended January 21, 1963] *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatiories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * *

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No. 21,801

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES T. BENN,

Defendant-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

On Appeal from the United States District
Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

JAMES T. BENN
1201 South Court House Road
Arlington, Virginia

Taxpayer, Pro, Se

August 27, 1968

REPLY BRIEF FOR THE APPELLANT

A R G U M E N T

A) The Government asserts in part that the granting of Summary Judgment was appropriate here since no triable issue of fact was raised in defendant answer and that the court below was entitled to hold the parties to the contents of their pleadings. This argument has some merit in many cases but is totally inapplicable to the instant situation since defendant's pleading here was filed in 1964 while the decision of the tax court was still pending on appeal and its outcome unknown.

Defendant's answer was thus nothing more than a general denial to prevent a default judgment against him pending said appeal.

The instant litigation was instituted by the Appellee, the United States Government, on October 1, 1964 and the amount of the tax claimed to be due at that time was $423,010.93 (Appellee Br. 9) as the unpaid balance owed by Defendant-Appellant, while concurrently having full knowledge that the amount of the Tax Court decision entered on April 3, 1964, six (6) months previous to the filing of this complaint did not exceed $153,905.48 (Appellee Br. 3) yet the Appellee demanded judgment in the amount of $423,010.93 (Appellee Br. 9). Pursuant to said Tax Court decision the $20,000 plus the $60,000 or a total of $80,000 (Appellee Br. 10)

should have been deducted from the said $153,905.48 thereby leaving an unpaid balance of $73,905.48 as the unpaid balance owed by Defendant-Appellant, nevertheless a Judgment in amount of $423,010.93 (Appellee Br. 9) was demanded by the Appellee.

The case was thereafter continued by stipulation for over two years until the Supreme Court proceedings were concluded.

Thus, defendant's answer to the complaint have been filed long before the true nature of this case emerged should not have had any bearing on the Summary Judgment motion. This argument by the Government does not reach the substance of the material issues here.

B) The Government next argues that the affidavit by the District Director of Internal Revenue, Jacksonville, Florida referred to in the Government's Answer Brief at Page 4 Footnote as the "O'Donnell Affidavit," provided the necessary factual basis for the Summary Judgment. Taxpayer respectfully submits that this affidavit does not meet the standard of Rule 56 (e) of Federal Rules of Civil Procedure, as quoted in full in Appellee's brief at Page 13;

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively tha t the affiant is competent to testify to the matters stated therein." (Emphasis supplied).

It is clear that O'Donnell's Affidavit reflects on its face that it was prepared by the Affiant upon knowledge and information gained from the examination of the files of the Internal Revenue Service and not O'Donnell's testimony about them, the records themselves would be the only admissible evidence on this point. Moreover O'Donnell could hardly be testifying from personal knowledge since at all material times from its very inception through the Tax Court decision (1958 through 1964) the District Director of the Internal Revenue Service in Jacksonville, Florida was Laurie W. Tomlinson and not O'Donnell. As such, the Affidavit does not comply with the express requirements of Rule 56 (e) of the Federal Rules of Civil Procedure, and this Court should refuse to consider such Affidavit as it is not made on personal knowledge of the Affiant O'Donnell and thus does not show affirmatively that the Affiant is competent to testify thereto. See Maddox v. Aetna Casualty and Surety Company, 259 F. 2d 51 (5th Cir. 1958); Roucher v. Traders & General Insurance Company, 235 F. 2d 423 (5th Cir. 1956); Inglett & Company v. Everglades Fertilizer Company, 255 F. 2d 342 (5th Cir. 1958). Since the Appellee elected to stand upon the factual recitations in O'Donnell's Affidavit as affording sufficient basis for the Summary Judgment, Defendant-Appellant respectfully submit that the United States Government did not comply with the express requirements of Rule 56 (e).

Thus, this affidavit on which the Government's motion primarily rested should not have controlled the factual question of how much tax is owed by the Defendant-Appellant since the amount is obviously in error.

C) The Government finally seeks to mitigate the significance of the proposed stipulated decision and further proposes, in a footnote, by various hypothetical explanations about the $80,000 of taxpayer's assets which have been siezed, and under the control, if not in the hands of the Internal Revenue Service.

The Government suggests that credit will be given where credit is due, and yet O'Donnell's Affidavit, which the Government cites as the definitive statement of taxpayer's account and indebtedness makes no mention whatever of the $80,000 in siezed funds.

It should be noted that the $80,000 referred to by the Appellee in its Answer Brief in the footnote at Page 10 thereof, was siezed in October, 1958 and that the litigation referred therein on taxpayer's other years (1956-1958) begain in 1962 four years after the siezure of the said $80,000. It could hardly be credited to the other years (1950-1958) since these years a re pending in the Tax Court.

Surely, $80,000 of this taxpayer's assets cannot be ignored on the vague possibility that they may have been, or will be credited at the appropriate time.

The status of these funds and the amount of tax due is clearly a triable issue as to a material fact.

It is respectfully submitted that for all the foregoing reasons the granting of the Government's Motion for Summary Judgment was improper and the judgment should be reversed and vacated with instructions that it be remanded for trial on the merits.

Respectfully submitted,

James T. Benn

James T. Benn, Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed to the Assistant Attorney General, Tax Division, Department of Justice, Washington, D. C. this 27th day of August 1968.

James T. Benn

James T. Benn